

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**ISO New England, Inc. and
New England Power Pool Participants Committee**

Docket Nos. ER10-787-000

**New England Power Generators Association v.
ISO New England Inc.**

EL10-50-000

**PSEG Energy Resources & Trade LLC, PSEG Power
Connecticut LLC, NRG Power Marketing LLC,
Connecticut Jet Power LLC, Devon Power LLC,
Middletown Power LLC, Montville Power LLC,
Norwalk Power LLC, and Somerset Power LLC v.
ISO New England Inc.**

EL10-57-000

**FIRST BRIEF OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES**

Pursuant to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Order on Forward Capacity Market Revisions and Related Complaints issued on April 23, 2010 (“April 23 Order”),¹ the Massachusetts Department of Public Utilities (“Mass DPU”) hereby submits its First Brief. In the April 23 Order the Commission accepted and set for paper hearing a filing by ISO New England Inc. (“ISO-NE”) and the New England Power Pool Participants Committee (“NEPOOL”) (collectively, the “Filing Parties”) proposing revisions to the market rules for ISO-NE’s Forward Capacity Market (“FCM”).² The Commission also consolidated the two complaints captioned above with the proceedings regarding the Filing Parties’ proposed changes to the FCM market rules.³ For the reasons set forth below, the Mass DPU urges the Commission either to (i) accept the entire package of

¹ *ISO New England Inc., et al.*, 131 FERC ¶ 61,065 (April 23, 2010) (“April 23 Order”).

² April 23 Order at P 1.

³ Id. at P 2.

rules changes or (ii) reject the entire package and send the issues back for further stakeholder process.

I. INTRODUCTION

On February 22, 2010, pursuant to Section 205 of the Federal Power Act (“FPA”), ISO-NE and NEPOOL proposed an integrated package of modifications to the FCM market rules (“Rules Changes Filing”).⁴ The Commission found certain aspects of the Rules Changes Filing to be just and reasonable and accepted those provisions without suspension.⁵ The provisions that were accepted include: (1) the proposal to develop both local resource adequacy (“LRA”) and transmission security analysis (“TSA”) based requirements for import-constrained capacity zones and to set the local sourcing requirement (“LSR”) at the higher of the two values;⁶ (2) the provision to decouple the Forward Capacity Auction (“FCA”) starting price from the Cost of New Entry (“CONE”);⁷ (3) the revisions to the rules governing the review of offers below 0.75 times CONE;⁸ (4) the compensation of resources that cannot prorate for reliability reasons;⁹ and (5) the clarifications concerning the obligations of resources without a Capacity Supply Obligation (“CSO”).¹⁰

The Commission found the remainder of the Rules Changes Filing had not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or

⁴ Various Revisions to FCM Rules Related to FCM Redesign, *ISO New England Inc. and New England Power Pool*, Docket No. ER10-787-000 (filed Feb. 22, 2010) (“Joint Filing”), amended by Supplement to Filing of Various Revisions to FCM Rules Related to FCM Redesign, *ISO New England Inc. and New England Power Pool*, Docket No. ER10-787-000 (filed Feb. 25, 2010) and Supplement to Joint Filing Detailing Stakeholder Process of New England Power Pool Participants Committee, *ISO New England Inc. and New England Power Pool*, Docket No. ER10-787-000 (filed Mar. 1, 2010) (“NEPOOL Supplement”).

⁵ April 23 Order at PP 15-16.

⁶ Id. at P 108.

⁷ Id. at P 139.

⁸ Id. at P 156.

⁹ Id. at P 163.

¹⁰ Id. at P 169.

preferential, or otherwise unlawful and set those issues for paper hearing requiring the Filing Parties to provide additional support for the tariff provisions that they have proposed.¹¹ The issues set for paper hearing include: (1) issues relating to the Alternative Price Rule (“APR”), including (a) triggering conditions, if any, (b) treatment of Out of Market (“OOM”) resources that create capacity surpluses for multiple years, and (c) the appropriate price adjustment under the APR; (2) modeling of capacity zones including (a) whether zones should always be modeled, (b) whether all de-list bids should be considered in the modeling of zones, (c) whether a pivotal supplier test is necessary, and (d) whether revisions to the current mitigation rules would be necessary in order to model all zones; and (3) what is the proper value of CONE and whether it should be reset.

The Commission further found that the extension of the price floor for three further commitment periods, FCA ## 4, 5, and 6, had not been shown to be just and reasonable.¹² However, the Commission recognized that as a transitional mechanism to offset flaws in the existing APR, an extension of the price floor may be appropriate.¹³ Therefore, the Commission accepted the price floor for FCA4 and stated that “in the Commission’s final order accepting an appropriate APR mechanism, we will terminate the price floor coincident with implementation of the new APR,”¹⁴ which it anticipates will be in time to govern FCA5.¹⁵ Therefore, the Commission did not set for paper hearing the question of whether a price floor for the FCM is appropriate.

¹¹ Id. at P 15.

¹² Id. at P 19.

¹³ Id. at P 19.

¹⁴ Id. at P 19.

¹⁵ Id. at P 19.

II. COMMENTS

The Mass DPU appreciates the opportunity to comment on this important matter. Although, to date, the Mass DPU has not commented in this proceeding and has abstained from actions related to the FCM by the New England Conference of Public Utility Commissioners (“NECPUC”),¹⁶ the Mass DPU has been an active participant in the stakeholder process throughout the long history of the development of a capacity market in New England. The Mass DPU will limit its comments at this time to the procedural issue of whether the Commission should accept some of the changes in the Rules Changes Filing while rejecting or modifying others and the legal question of whether the Filing Parties have met their burden of proof.¹⁷

A. The Commission Should either Accept or Reject the entire Package of Rules Changes

Pursuant to Section 205 of the Federal Power Act, the Filing Parties submitted the Rules Changes Filing as a coordinated package of changes to the existing FCM rules.¹⁸ The Filing Parties stated that the Rules Changes “are just and reasonable, and should be approved by the Commission.”¹⁹

¹⁶ The Mass DPU abstained in the original NECPUC vote to support the Rules Changes Filing and in the vote on NECPUC’s submission of the May 24, 2010 Request for Rehearing submitted jointly with the Connecticut Department of Public Utility Control, NSTAR Electric Company, the Northeast Utilities Companies, National Grid USA, the Energy Consortium, and the Connecticut Office of Consumer Counsel.

¹⁷ On June 15, 2010, ISO-NE briefed stakeholders on how it is likely to respond to FERC’s April 23 Order. Instead of providing additional information to support the Rules Changes Filing, ISO-NE will be making a substantially different proposal. The Mass DPU reserves comment on any new ISO-NE proposal submitted in ISO-NE’s First Brief.

¹⁸ See Rules Changes Filing at 3 (noting “that individual Participants have many reasons for taking the positions they have on this package of changes”).

¹⁹ Id. at 10.

In their joint comments supporting the Rules Changes Filing the Connecticut Department of Public Utility Control (“CT DPUC”), NECPUC, the New Hampshire Public Utility Commission and the Vermont Public Utility Commission stated:

[t]he [Rules Changes] Filing carefully balances varied interests, and any alteration in that delicate compromise would upset the negotiating parties’ conclusion that they had reached a fair bargain by accepting some terms and rejecting others. In order to reach such a broad consensus on a package of FCM modifications, the stakeholders necessarily made substantial concessions on certain issues that they would never have agreed to if decisions to modify the FCM had been made on a discrete, issue-by-issue basis. In this way, the Joint Filing – which modifies the original bargain struck to create the FCM – is akin to a settlement agreement that represents a package of complex compromises.²⁰

Thus, these state regulators made clear that compromises had been struck in which certain provisions were accepted in light of the acceptance of other provisions and that it was important to consider the Rules Changes Filing as an integrated package of changes that works as a whole, not as a piecemeal set of provisions, some of which can be accepted while others are rejected. Accordingly, the Commission should either accept the Rules Changes Filing as a complete package or reject it in total.

As an initial matter, the Filing Parties have met their burden under Section 205 and have demonstrated that the Rules Changes are just and reasonable. When a filing is made by a public utility under Section 205, the Commission “plays an essentially passive and reactive role,” whereby it “can reject [a filing] only if it finds that the changes proposed by the public utility are not ‘just and reasonable.’”²¹ Even if other parties offer alternate rules changes, as

²⁰ Notice of Intervention and Comments of the Connecticut Department of Public Utility Control, et. al., Docket No ER10-787-000 (filed Mar. 15, 2010) (“CT DPUC Comments”) at 5-6 (internal citations omitted).

²¹ *Atlantic City Elec. Co. v. FERC*, 295 F. 3d 1, 9-10 (D.C. Cir. 2002) (internal citations omitted).

the New England Power Generators Association has in this instance,²² the Commission must limit its inquiry to “whether the rates proposed by a utility are reasonable – and [this inquiry does not] extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs.”²³ The Filing Parties have met their burden of proof and therefore the Commission should accept the filing, regardless of whether or not the Commission can conceive of an alternative proposal that it prefers.

However, if the Commission should determine that the Rules Changes Filing, considered as a package, is unjust and unreasonable, the Commission should reject it in its entirety and refer the issues back to ISO-NE to pursue further stakeholder process. The Commission should not approve certain of the provisions while making changes to others. This is the case for four reasons: (1) the Rules Changes Filing was submitted as an integrated package, not as a set of separate and unrelated provisions to be considered each on its own; (2) because stakeholders viewed the Rules Changes Filing as a package they refrained from commenting on or protesting individual provisions, denying the Commission the opportunity to hear robust debate on those issues and consider those arguments in its deliberations; (3) the Commission’s uncoupling of the package of changes will quash interest among stakeholders in future matters to reach compromise; and (4) concerns raised by some commenters and protesters can and should be addressed in the stakeholder process in the first instance.

²² Motion to Intervene and Protest of the New England Power Generators Association, *ISO New England Inc. and New England Power Pool*, Docket No. ER10-787-000 (filed Mar. 15, 2010).

²³ *Cities of Bethany, Bushnell et al. v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984), *cert. denied*. 469 U.S. 917 (1984) (“*Cities of Bethany*”); *see also ISO New England Inc.*, 114 FERC ¶ 61,315 at P 33 (2005) (citing *Pub. Serv. Co. of New Mexico v. FERC*, 832 F. 2d 1201, 1211 (10th Cir. 1987) and *Cities of Bethany* at 1136).

1. Rules Changes Filing Is an Integrated Package

The Rules Changes Filing represents a delicate balance of interests among a diverse set of stakeholders that was arrived at after a lengthy and comprehensive stakeholder process. If the Commission accepts some of the provisions and rejects others it will upset the delicate balance that was reached. For example, the proposal to use the higher of the deterministic TSA or the probabilistic LRA reliability criteria to set the LSR, which the Commission has accepted as just and reasonable, works in harmony with the zonal modeling provisions, which the Commission has not accepted, but has set for paper hearing.

The April 23 Order accepts certain provisions while setting others for paper hearing with the possibility that they may be altered. By doing so the Commission risks implementing a set of provisions that are not harmonized and may not preserve the FCM's coherent market design. The Rules Changes Filing was intended as an integrated package of compromised positions and the Commission should either accept it in total or reject it in total.

2. Stakeholders Refrained from Commenting on Individual Provisions
Denying the Commission the Opportunity to Hear Robust Debate on
those Issues and Consider those Arguments in its Deliberations

As noted above, stakeholders made compromises accepting certain provisions to which they objected in consideration of other provisions. With this balance in mind, many stakeholders, especially those supporting the Rules Changes Filing, did not submit comments or protests on individual provisions.²⁴ As a result, the Commission did not hear the robust debate that occurred in the stakeholder process on many of these issues, particularly those that

²⁴ For instance, in stakeholder discussions of the Forward Capacity Market Working Group and in private conversations, the Mass DPU heard many stakeholders express concerns about the proposal to use the higher of the deterministic TSA or the probabilistic LRA reliability criteria to set the LSR. However, few, if any, raised such concerns in their comments in this proceeding.

the Commission accepted as just and reasonable. Thus, the Commission heard protests primarily from one sector only, rather than from the broader group of stakeholders, many of whom had concerns with some provisions but withheld those arguments in support of the compromise. Thus, the Commission should accept the Rules Change Filing in its entirety or, in the alternative, reject the entire package and remand the package back to the stakeholder process for further review.

3. Future Negotiation Will Be Deemed Fruitless

The Rules Changes Filing is the end result of a lengthy stakeholder process among a diverse set of stakeholders with differing interests. The benefits of the stakeholder process would be lost if the Commission were not to treat the Rules Changes Filing as an integrated and coordinated package but instead accept only certain of the provisions while rejecting others. Our concern is that, in the future, parties will not enter into protracted negotiations. Parties, and in particular state commissions with limited resources, will not expend the time and energy to come up with a carefully negotiated solution if the Commission does not feel bound either to accept or reject the entire package. The Commission has determined that the stakeholder process was properly conducted;²⁵ it should respect the result and either accept or reject the Rules Changes Filing in its entirety.

4. If the Commission Rejects the Rules Changes Filing it Should Send it back to the Stakeholders for Additional Process

As stated above, the Mass DPU believes that the Filing Parties have met their burden of proof under Section 205 and therefore that the Commission should accept the Rules Changes Filing as just and reasonable. However, should the Commission reject the Rules Changes

²⁵ April 23 Order at P 16.

Filing we recommend that the Commission send the issues back to ISO-NE for further stakeholder process. The Filing Parties acknowledged in their filing that not all of the major issues regarding FCM design were resolved, largely due to the limited scope of the review and limited time available to complete the FCM Working Group process.²⁶ The FCM Working Group had to balance the volume of issues it could address, the quality of that review, and the time available. Therefore, recognizing that further work was required, the Filing Parties committed to a future stakeholder process that would consider several issues, including the definition of OOM resources, when the APR should be triggered, and how the price should be set in those circumstances.²⁷ These are the very issues raised by some of the commenters and protestors. The Filing Parties also stated that ISO-NE would retain an economic consultant to assist in addressing these issues and would make a filing within 18 months either proposing market rules changes or providing a status report on discussions on these and other related FCM matters.²⁸

Should the Commission reject this filing, the Mass DPU requests that it provide stakeholders with an opportunity to further negotiate the issues to address the Commission's concerns, perhaps on a more expedited basis than the 18 months contemplated in the Rules Change Filing. Just as the Commission has encouraged the parties to continue the stakeholder discussions in light of the guidance provided by the April 23 Order,²⁹ we would invite and value more robust and clear Commission guidance on what the end product of further negotiations might look like. The Commission could provide clear assistance to the parties on

²⁶ Id. at PP 7, 170.

²⁷ Id. at PP 7, 170.

²⁸ Id. at PP 7, 170.

²⁹ Id. at P 183.

what the broad outlines of a negotiated solution should look like, while allowing the stakeholders to fashion the optimal FCM methodology to address their specific concerns and the specific nature of ISO-NE's footprint. Such a process would allow the stakeholders to fully vet any proposals that are presented. The alternative of attempting to decide such highly complex, difficult and contentious issues in an expedited paper hearing is fraught with the risk of adopting measures whose consequences cannot possibly be foreseen.

III. CONCLUSION

The Mass DPU urges the Commission to find that the package of changes proposed by the Filing Parties is just and reasonable. If the Commission does not believe that the Rules Changes Filing is just and reasonable, the Commission should reject it in its entirety, provide additional guidance to the parties and order further stakeholder process to fully vet the issues raised by the comments and protests and to determine what further improvements to the FCM are warranted. For the foregoing reasons, the Mass DPU hereby files its First Brief and respectfully requests that the Commission consider the comments provided herein in its deliberations.

Respectfully submitted,
MASSACHUSETTS DEPARTMENT OF
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon each party on the official service list compiled by the Secretary in this proceeding in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.2010.

Dated at Boston, Massachusetts, this first day of July, 2010.

/s/ Thomas E. Bessette
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